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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,

Petitioners,

v.

CLEBURNE LIVING CENTER, et al.,

Respondents.

PETITION FOR A WRIT OF CETIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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89 PP

QUESTIONS PRESENTED

1. Whether mentally retarded persons are a "quasi-suspect" class for purposes of Equal Protection analysis.
2. Whether for Equal Protection analysis, all legislation affecting mentally retarded persons must be tested by an "intermediate" or "heightened" level of scrutiny.

LISTING OF PARTIES

PETITIONERS:

City of Cleburne, Texas
George W. Marti, Mayor of the City of Cleburne
J. T. Bass, Member of the Cleburne City Council
Arval Martin, Jr., Member of the Cleburne City Council
Lonnie Watson, Former Member of the Cleburne City Council, who resigned August 30, 1984
(Replaced Alfred Johns, deceased)
Susan McMillion, Cleburne City Attorney
(Replaced Robert T. Miller, Jr.)

ATTORNEYS FOR PETITIONERS:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert T. Miller, Jr.
Mary Milford

RESPONDENTS:

Cleburne Living Center, Inc.
(Now known as Community Living Concepts, Inc.)
Johnson County Association for Retarded Citizens
Jan Hannah
Advocacy, Inc.

ATTORNEYS FOR RESPONDENTS:

Advocacy, Inc.
Renea Hicks
Diane Shisk

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v.

CLEBURNE LIVING CENTER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 5, 1984, rehearing en banc and panel rehearing denied July 6, 1984.

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, filed its unpublished Memorandum Opinion — Findings of Fact and Conclusions of Law on October 4, 1982, which is reprinted in Appendix A. The Judgment, also filed on October 4, 1982, is reprinted in Appendix B.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed March 5, 1984, reported in 726 F.2d 191, is reprinted in Appendix C.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed July 6, 1984, denying Petition for Rehearing and Suggestion for Rehearing En Banc, reported at 735 F.2d 832, is reprinted in Appendix D. The mandate was issued on July 16, 1984, reprinted in Appendix E, and on August 27, 1984, the Court entered its Order granting a recall and stay of the mandate until September 27, 1984, which Order is reprinted in Appendix F.

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 5, 1984, and is reported at 726 F.2d 191. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on July 6, 1984, and this Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment XIV, Sec. 1

[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents brought suit to have the City of Cleburne's zoning ordinance declared unconstitutional which, although it allows placement of a business providing residential care for mentally retarded persons anywhere in the City, requires a special use permit for the establishment of such a business. The pertinent portions of the ordinance are reprinted in the opinion below, Appendix C-6; 726 F.2d at 193. After consideration of several factors, the City found the location applied for was inappropriate to the proposed use and denied the special use permit. See opinion below, Appendix C-23; 726 F.2d at 194.

The District Court applied the "rational basis" test to the ordinance, as written and as applied, and found it to be rationally related to legitimate purposes and interests of the City of Cleburne. Furthermore, it was not arbitrary, capricious nor irrational.

The panel established that mentally retarded persons were a "quasi-suspect" class for Equal Protection analysis and applied an intermediate level of scrutiny, requiring that the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives, to the review of the ordinance. While the panel found that the interest asserted by the City was substantial in nature, it found that there was not the required *substantial* nexus between the asserted interests and the ordinance and therefore, held that the

ordinance violated the Equal Protection clause of the Fourteenth Amendment, both as written and as applied. Key to the panel's decision in finding the lack of necessary relevance of the ordinance to the City's goals was the panel's *assumption* that because the property in question was located in an apartment house district, "the same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." See opinion below, Appendix C-20; 726 F.2d at 200. This is simply not so. The structure in question was a 2500 square foot frame house with four bedrooms and two baths in which Petitioners planned to house fifteen unrelated adult men and women along with support staff. The ordinance does not confer on this structure the characteristics of a boarding house for fifteen people or of a hospital, which is also a permitted use. One of the prime reasons for the denial of the special use permit was that the structure was not appropriate for its intended use of housing fifteen people — nor would it be appropriate as a boarding house for that many people.[1] The evidence shows that the state has now reduced the number of people to six in such a facility verifying the reasonableness of the City Council decision. See District Court opinion Finding of Fact 38 at p 11. Appendix A-9, 10.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to resolve the Questions Presented which concern whether mentally retarded persons are a "quasi-suspect" class for purposes

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[1]This Court has held in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 102 S.Ct. 3469 (1982), that a governmental entity has the authority, rather than a federal court, to interpret its own legislation.

of Equal Protection analysis, and the appropriate level of scrutiny to be applied to the challenged zoning ordinance of the City of Cleburne.

The decision below is in direct conflict with the decision of the Ninth Circuit Court of Appeals in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983), the decision of another Fifth Circuit panel in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), as well as the district court opinions in *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981), *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365 (D.N.H. 1981), and *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), as to the status of mentally retarded and other handicapped persons for Equal Protection analysis and as to the level of scrutiny to be applied in reviewing legislation[2] which affects those persons. The establishment of the appropriate classification and level of scrutiny for Equal Protection review of legislation affecting mentally retarded persons are substantial and important federal questions which have not been, but which should be, settled by this Court.

Finally, the decision below is contrary to the principle established by the Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973) that intelligence and physical disability are non-suspect statuses.

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[2]The term "legislation" is used in this Petition as being inclusive of agency regulatory action or other governmental promulgations as well as legislation.

THERE IS A CONFLICT AMONG THE CIRCUITS

It is clear that the conflict between the United States Court of Appeals for the Fifth Circuit and Ninth Circuit is one that can be effectively resolved only by the prompt action of the Supreme Court alone. In determining whether mentally retarded persons constitute a "quasi-suspect" class, the Fifth Circuit incorrectly characterized the question "as one of first impression" among appellate courts. See opinion below, Appendix C-12; 726 F.2d at 196. The Fifth Circuit's treatment of what it determined to be a novel issue is, however, contrary to the decision of the Ninth Circuit in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983) and a decision of its own panel in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), both of which held that the handicapped, which includes mentally retarded, were a non-suspect class for which rational basis level review is appropriate.

In *California Association of the Physically Handicapped*, the plaintiff brought suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Fourteenth Amendment for the FCC's refusal to include the handicapped in its EEO program, arguing that the handicapped should be considered a suspect class and that under the strict scrutiny standard applicable to a suspect class, the FCC's actions should be held unconstitutional. In applying the "rational basis" test to distinctions involving non-suspect classifications, the Ninth Circuit unequivocally stated the following:

> No appellate court, however, has held that the handicapped are a suspect class. *Brown v. Sibley*, 650 F.2d 760, 766 (5th Cir. 1981). We decline to be the first.

In *Brown*, which the Ninth Circuit relied on in *California Association of Physically Handicapped*, the Fifth Circuit panel was likewise presented with a handicapped plaintiff's request for strict judicial scrutiny under the Fourteenth Amendment and for review under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, of a state agency's policy against the visually impaired working in supervisory positions. The Fifth Circuit held that "the only inquiry is whether [the defendant state agency's] alleged classification scheme is 'rationally related to the [state agency's] objective' " and stated that:

> No Court has ever declared that handicapped persons constitute a suspect class for purposes of equal protection analysis, and we decline to do so today.

Brown, supra at 766.

Both the *Brown* and *California Association of Physically Handicapped* cases were brought within the context of Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and ruled on the Equal Protection status of handicapped persons as defined by the Rehabilitation Act, which specifically includes mentally retarded persons.[3] *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1978).

Therefore, the decision of the Fifth Circuit panel in the case below is novel, not because it is a case of "first impres-

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[3]The Rehabilitation Act, 29 U.S.C. § 706, defines a handicapped individual as:

> . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

sion" but rather because it is at odds not only with the Ninth Circuit and the Fifth Circuit panel in *Brown*, but also because it is contrary to the principles established in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973). This Court in *Frontiero*, stated that sex is an immutable characteristic and held that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny but carefully distinguished "... sex from such *nonsuspect statuses as intelligence or physical disability*" for the reason "that the sex characteristic frequently bears no relation to ability to perform or contribute to society." (emphasis supplied). *Id.* at 686.

Furthermore, at the district court level, *Anderson v. Banks*, 520 F. Supp. 472, 512 (S.D. Ga. 1981) held that mentally retarded persons were not a suspect or "quasi-suspect" class. Two other district courts have also failed to confer "quasi-suspect" status on mentally retarded persons, even when they are institutionalized, *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365, 371 (D.N.H. 1981); *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973).

The only district court decision to apply a heightened level of scrutiny dealing with mentally retarded persons is *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983), which involved the deplorable conditions at the state school for the mentally retarded. The *Olson* court found that mentally retarded persons failed to satisfy the criteria for suspect status; however, the court required the state "to show that the disparities in educational opportunity which exist between the mentally

retarded and other citizens substantially furthers important state interests". *Id.* at 490.

The Eighth Circuit resolved the issues presented in *Olson* under North Dakota law and the Education for All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, without having to reach any Equal Protection issues regarding the mentally retarded.

It is also important to consider that seven out of the fifteen judges who comprise the Fifth Circuit Court of Appeals dissented from the denial of a rehearing en banc by the other eight members of the Court in the decision below. Six out of the seven dissenters stated that "[t]he panel has made a holding no other federal appellate court has" and found the holding "not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration." See dissent to denial of rehearing, Appendix D-2; 735 F.2d at 832.

In holding that the mentally retarded constitute a "quasi-suspect" class for Equal Protection purposes and that legislation regarding the mentally retarded should be given intermediate scrutiny, the panel rejected the position that has either been adopted or supported by the Courts of Appeal which have already considered these matters and a clear majority of the federal district courts which have ruled on the question to date as well as this Court's holding in *Frontiero*. The conflict is explicit and direct. The Court should grant a writ of certiorari to resolve this conflict.

THE QUESTION IS SUBSTANTIAL

This Court has not had an opportunity to review whether mentally retarded persons constitute a new "quasi-suspect"

class for Equal Protection analysis or whether legislation which affects the mentally retarded should be given intermediate scrutiny. These questions are important ones on which this Court should rule.

The panel's resolution of these sensitive constitutional issues obviously invites new plaintiffs to litigate a potentially vast spectrum of issues in the federal courts on the strength of the panel's holding. Municipalities, states, state agencies, and school districts across the nation can expect to face a plethora of federal challenges to their ordinances, statutes, regulations and policies affecting the mentally retarded if the panel decision stands. The vast amounts of public resources which undoubtedly will be consumed in this forthcoming litigation are resources that could otherwise be used to help the mentally retarded. The specter of these oncoming legal battles, with their attendant expense and consumption of judicial resources, genuinely merits the attention of this Court before the floodgates are opened in this highly sensitive and emotional area.

Needs of the mentally retarded have been and should be addressed legislatively rather than by the judiciary. The commentators are legion in their espousal of the legislative approach over the clearly less preferred litigious constitutional approach in promoting and protecting the rights of the handicapped, including the mentally retarded.[4] Indeed,

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[4]Johnson, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?* 7 Ohio No. L. Rev. 64 (1980); Roberto, *Can the Mentally Retarded Enjoy "Yards that are Wide?"*, 28 Wayne L. Rev. 1349 (1982); Reiner, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning;* 82 W.Va. L. Rev. 669 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives,* 5 N.Y.U. Rev. L. & Soc. Change 137 (1975).

this Court has held that courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Harris v. McRae*, 448 U.S. 297, 307, 100 S.Ct. 2671, 2683 (1980).

The rights of the handicapped, including the mentally retarded, are already protected by Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) which provides that

> no otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal assistance.

The Developmental Disabilities Services and Bill of Rights Act, 42 U.S.C. § 6000, *et seq.*, established another federal-state grant program and declared that persons with developmental disabilities have "a right to appropriate treatment, services, and habilitation" which "should be provided in the setting that is least restrictive of that person's personal liberty." The Education for All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, provides that the federal government would assist the states in giving all handicapped children a free appropriate public education, and requires "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped," thus requiring what is known as "mainstreaming." Likewise, Department of Transportation and Related Agencies Appropriation Acts, 1975-1984, require that an applicant for federal financial assistance provide certain facilities and services to the elderly and disabled.

The legislature of the State of Texas has provided for the protection of the rights of the mentally retarded in the

Mentally Retarded Persons Act of 1977 (Vernon's Ann. Civ. St. art 5547-300) including the "right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate for the individual's needs." Section 15. The Respondents, in fact, alleged violations of this Act in their Original Complaint; however, they opted to no longer pursue these pendent state claims and voluntarily dismissed them. R. Vol. I, p. 238. Additionally, 22 states have enacted statutes mandating in various ways and degrees the location of community homes in residential areas.[5]

The Fifth Circuit's establishment of the mentally retarded as a new cognizable "quasi-suspect" class may place in jeopardy the application of these laws protecting the handicapped, including the mentally retarded. By entitling the mentally retarded to a heightened level of judicial scrutiny and "quasi-suspectness," the Fifth Circuit's opinion could emasculate the heretofore mentioned laws which protect the handicapped, including the mentally retarded, because it would be a violation of the mental retardate's constitutionally afforded rights to treat him or her in a different manner than a person of greater intelligence, ability, social adaptability, and economic productivity.

Rather than institute a sweeping change throughout the nation which will affect each mentally retarded person indiscriminately without regard to his or her particular developmental level and disability, the Petitioners urge this Court to consider that the condition of each mentally retarded person is unique in that he or she may be classified anywhere at a level ranging from a moderate or mild re-

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[5]Roberto, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 Wayne L. Rev. 1349, 1378 (1982)

tardate to an individual possessing severely and profoundly retarded characteristics, with each mental retardate requiring a different level and degree of treatment. See dissent to denial of rehearing, Appendix D-5, 6; 735 F.2d at 834.

The Respondents' expert, Dr. Roos, testified at trial that mental illness and mental retardation require "entirely different approaches." See opinion below, Appendix C-4; 726 F.2d at 197, n.2. Judge Garwood and the other dissenters who joined with him found this testimony to be significant in raising the issue in their minds as to whether "the presence of difference in approach" is to be treated as "quasi-suspect". See dissent to denial of rehearing. Appendix D-4; 735 F.2d at 833. Judge Garwood went on to state

> It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"? Are we to review as "quasi-suspect" the failure of governmental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared? Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the non-retarded, but where

> judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded. (emphasis in the original).

Appendix D-4, 5; *Id.* at 833-834.

As Judge Garwood has suggested, the Fifth Circuit panel's decision to classify all the mentally retarded as a "quasi-suspect" class with attendant heightened scrutiny will obviously involve the courts in the issue which will inevitably be raised regarding the adequacy of medical treatment for the mentally retarded. It is important to consider the corollary of these consequences — the federal judiciary's intrusion into the state's regulations regarding the mentally retarded. Judge Garwood determined:

> State regulations will inevitably distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view a *major and unwarranted extension of federal judicial powers*, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. (emphasis supplied).

Appendix D-6; *Id.* at 834.

Furthermore, the Fifth Circuit's decision in the case below will greatly impact the autonomy of state, local and school authorities to interpret their own legislation. This Court has held in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 102 S.Ct. 3469, 3471, 3472 (1982) that a school "[b]oard's interpretation of its own regulations

controls" over a judicial interpretation of the regulations because "federal courts were not authorized to construe school regulations." In holding that the Court of Appeals erred in substituting its own notions for the school board's definition of its rules, this Court in *McCluskey* relied upon its prior holding in *Wood v. Strickland*, 420 U.S. 308, 325, 95 S.Ct. 992, 1002 (1975):

> "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement."

Supra, at 3471. Unless writ of certiorari is granted, the Fifth Circuit's decision in the case below will stand as a harbinger of unnecessary and unwarranted judicial interference in state, local and school legislation and the ability of those entities to interpret their own legislation.

The timely resolution of this issue is a vital one to all the municipalities, states, state agencies and school districts across the nation as well as the United States government in the implementation of the laws regarding the handicapped, including the mentally retarded, as it is to the City of Cleburne and Community Living Concepts, Inc.

THE COURT OF APPEALS DECISION IS INCORRECT

Petitioners contend that the mentally retarded do not constitute a "quasi-suspect" class for purposes of Equal Protection analysis, and that the challenged zoning ordinance of the City of Cleburne should be analyzed at the rational review level.

Mental retardation is essentially a problem of learning manifested in difficulty with abstract thinking, judgment, problem solving and retention, and includes problems of

social adjustment and economic productivity. (R. Vol. 1, pp. 137-138). It is a varied condition ranging from mildly and moderately retarded to severely and profoundly retarded with IQ as the basic measurement device as well as adaptive behavior and medical classification, according to Dr. Roos. (R. Vol. 1, p. 138). Mild retardation is hardly discernible on casual contact; the mentally retarded can become self-sufficient, economically productive members of society, in fact, most become "invisible" after they leave school, whereas, at the other end of the spectrum, many of the profoundly retarded are devoid of any degree of self-sufficiency and require institutionalization. (R. Vol. 1, p. 140). This description given by Dr. Roos is a far cry from the "discrete, insular minority" referred to in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, 58 S.Ct. 778, 783-784, n.4 (1938).

In many instances it would be necessary to subject these persons to an IQ test to determine if they are in the protected class, with those having an IQ of 70 or under being a "quasi-suspect" specially protected class and those having an IQ over 70 not qualifying for this special solicitude from the courts. (R. Vol. 1, p. 140). Mentally retarded persons are in reality a "large, diverse and amorphous class" and as such they do not qualify for "quasi-suspect" status. See *San Antonio Independent School District v. Rodriguez*, 411 U.S.1, 28, 93 S.Ct. 1278, 1294 (1973).

While courts have recognized and defined criteria for a suspect classification, the "quasi-suspect" classification is still in an emerging state of definition without specified parameters. The establishment of a "quasi-suspect" class appears to turn on whether the classes share some of the criteria of suspectness. However, the courts have left

unanswered which of these criteria are most relevant and how much weight they should be given.

At the outset, the panel recognized that the mentally retarded did not satisfy all of the criteria for a suspect class. The panel did not establish a clear-cut rule for a determination of "quasi-suspect" status, but arrived at a factual determination that mentally retarded persons shared three of the criteria for suspectness — historical prejudice, political powerlessness and immutability — which were set out in *San Antonio Independent School District vs. Rodriguez, Id.*

The panel based its finding of historical prejudice and political powerlessness on conditions that existed in the first half of the century but that have since ceased to exist or changed dramatically since 1950. Dr. Phil Roos testified that while mentally retarded persons may not have been well treated in the past, this is no longer the situation:

Q. What happened in 1950?

A. A number of things — a presidential panel on mental retardation was established, which later became the President's Committee on Retardation, which became a strong and viable advocate for retarded persons at the national level. Our own association, the Association for Retarded Citizens, was founded in 1950, and became a very strong consumer advocate voice in the nation. A new philosophy began to permeate the field of mental retardation and other disabilities; consumerism became an important force. (R. Vol. 1, p. 142).

Q. Well, has the public a good understanding of mental retardation today?

A. It has improved in the last few years. This has been due in part to media coverage, and to the picturing of mentally retarded people through the media as real, genuine human beings. (R. Vol. 1, p. 144).

Likewise, the mentally retarded are not a politically powerless group. This fact is evidenced by the various legal reforms concerning the rights of the mentally retarded that have occurred in many states as well as by the enactment of federal legislation aimed at continually improving the conditions of the handicapped, including the mentally retarded, as were enumerated in the prior section. The proliferation of advocacy and representative groups for the handicapped bears witness to their growing political power. In the case at bar, two such groups are interested — Advocacy, Inc., a federally funded legal advocacy group, and the Johnson County Association for Retarded Citizens.

Finally, the panel declared that the mentally retarded deserved special consideration because their condition is immutable. See *Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745 (1979). However in doing so, the panel totally ignored the relationship of the disability to the stereotypical thinking associated with mentally retarded persons, which Judge Garwood termed the "threshold requirement for scrutiny beyond the rational basis level". See dissent to denial of rehearing, Appendix D — ; 735 F.2d at 832. In other words, to establish this threshold requirement, the panel should have determined whether the class of the mentally retarded lacks a

> significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either generally or in respect to the regulatory area under consideration.

Appendix D-5; 735 F.2d at 834. Distinctions based on sex, legitimacy, or illegal alienage come within the ambit of "quasi-suspectness" for Equal Protection analysis, and are

"generically different" from a classification based on mental retardation. See dissent to denial of rehearing, Appendix D-2; 735 F.2d. at 832-833. Judge Garwood is entirely accurate in his statement that the mentally retarded "*are* materially different from the rest of society, and are so as a result of their class-defining characteristics." (emphasis in the original). See dissent to denial of rehearing, Appendix D-3; 735 F.2d at 833.

As this Court observed in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973):

> ...what differentiates sex from such *non-suspect statuses as intelligence or physical disability*, and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.* (emphasis supplied).

Subsequently, in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567 (1976), this Court again made reference to the relationship of the stereotyped characteristic to the actual ability. The Third Circuit heeded the *Frontiero* and *Murgia* decisions in deciding that mentally ill persons were not a suspect class in *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979). Although mental retardation is a totally different disability than mental illness, the rationale of the relationship between the actual disability and the stereotype characterization is applicable to some of the mentally retarded.

The Fifth Circuit dissent to the denial of the rehearing, Appendix D-3, 4; 735 F.2d at 833, distinguished the unique differences inherent in the mentally retarded:

> The characteristics which define the retarded as a class — the presence from birth or early childhood of

> an incurable, though ameliorable, significant deficit in intellectual development and social adaptation — bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions, and are highly relevant to proper legislative goals in most respects.
>
> And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill ... In short, the retarded present a *special* set of needs, requirements, and problems unique to their condition. (emphasis in the original).

This Court should not acquiesce to the establishment of yet another new "quasi-suspect" class, comprised of the mentally retarded and the challenged zoning ordinance should be scrutinized at the rational basis level. In both *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981) and its progeny, *California Association of the Physically Handicapped, Inc.*, 721 F.2d 667 (9th Cir. 1983), the Courts of Appeal applied the "rational basis" test to legislation affecting the mentally retarded after holding that handicapped persons did not constitute a "suspect class." The second prong of this analytical process only inquires as to whether the challenged zoning ordinance is "rationally related to the [City's] objective." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 315, 96 S.Ct. 2562, 2568 (1976). "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [City's] objective." *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105 (1961).

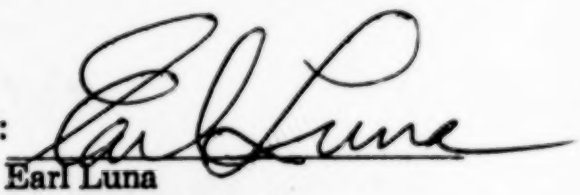
The decision below refuses to recognize the decisions in *Brown v. Sibley, supra,* and *California Association of the Physically Handicapped, Inc., supra,* as well as the principles established by this Court in *Frontiero, supra,* which cases declined to apply suspectness to the handicapped, which includes the mentally retarded, but did apply the rational basis level of review to those who are classified according to intelligence and physical disability, which includes the mentally retarded. The lower court's refusal to apply these prevailing precedents as well as the potential impact on state, local and federal legislation is so erroneous as to call for correction by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted

LAW OFFICES OF EARL LUNA, P.C.

By: 

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PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that on the 21st day of September, 1984, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States mail, with first-class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 1006 East 50th Street, Austin, Texas 78751.

Earl Luna
Earl Luna

SUBSCRIBED AND SWORN To before me by the said Earl Luna, on this the 21st day of September, 1984.

Betty Jarratt
Notary Public, State of Texas
My commission expires 11/30/84

APPENDIX

U.S. District Court
Northern District of Texas
F I L E D
Oct. 4, 1982
Joseph McElroy, Jr., Clerk
By Pam Hill
Deputy

In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

NO. CA-80-1576-F

CLEBURNE LIVING CENTER, et al.,

v.

CITY OF CLEBURNE, TEXAS, et al.

MEMORANDUM OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Plaintiff Cleburne Living Center, Inc. (hereinafter referred to as "CLC") is a three shareholder Texas corporation organized for the purpose of establishing and operating supervised group homes for persons who are mentally retarded. The corporation is not a non-profit organization. It has leased a house at 201 Featherston Street in the City of Cleburne, Texas from Jan Hannah for the purpose of establishing a group home for thirteen mentally retarded adults at that address. On or about February 4, 1982, CLC changed its corporate name to Community Living Concepts, Inc., but the name change left unaffected all other aspects of CLC.

2. Plaintiff Jan Hannah is CLC's Vice President and holds one third of the corporation's outstanding stock. She is the owner of the house at 201 Featherston Street in the City of Cleburne, having purchased it in July, 1980, for the purpose of leasing it to CLC for the operation of a group home for persons who are mentally retarded.

3. Plaintiff Johnson County Association for Retarded Citizens (hereinafter Johnson County ARC) is a non-profit Texas corporation established for the purpose of advocating and representing the interests of the mentally retarded residents of Johnson County. It has approximately two hundred (200) members, among whom are parents of mentally retarded children and adults, mentally retarded persons (at least one of whom, Sylvia Sims, is a potential resident of the home), special education teachers and educational diagnosticians employed by the Cleburne Independent School District, and other concerned Johnson County residents. As an organization, it supports the establishment of group homes, including the Featherston Street one, for persons who are mentally retarded.

4. Plaintiff Advocacy, Inc., is a non-profit Texas corporation formed to insure and protect the legal rights of persons who are developmentally disabled, including those who are mentally retarded persons. It is a statewide legal advocacy system affiliated with the State Bar of Texas and established pursuant to 42 U.S.C. § 6012. Among the rights for which Advocacy, Inc. advocates is the right of mentally retarded persons to live in group homes in community settings.

5. Defendant City of Cleburne is a municipal corporation established pursuant to the laws of the State of Texas. As a Texas municipal corporation, the city has certain powers and duties, among which are certain zoning powers.

6. Defendant George W. Marti is the Mayor of the City of Cleburne. In conjunction with his duties as mayor, he is the chairman of the City of Cleburne City Council and a voting member of that council in case of ties.

7. Defendants J. T. Bass, Arval Martin, Jr., and Alfred Johns are elected, voting members of the City of Cleburne City Council which is empowered under Texas law to enact municipal zoning ordinances and which is responsible for granting or denying special use permits under the City of Cleburne zoning ordinance.

8. Defendant Robert Miller is the City Attorney for the City of Cleburne, responsible for the prosecution of violations of the City of Cleburne zoning ordinance.

9. In July, 1980, Jan Hannah purchased the lot and house located at 201 Featherston Street in Cleburne, Texas (hereinafter sometimes referred to as the Featherston Street home). This property is officially described in Cleburne city records as the north two thirds of lot 1, block 498, of the City of Cleburne.

10. At the time of purchase by Jan Hannah, the Featherston Street home was in a district classified under Cleburne's zoning ordinance as an apartment house district. The use district also is called an R-3 zone. That zoning classification is still the same for the home at the time of trial.

11. On June 8, 1965, the City Council of the City of Cleburne enacted a zoning ordinance for the city which included for the first time in the city zoning ordinance the texts of §§ 8(6) and 16(9) of the current ordinance as they now read.

None of the current city council members of the City of Cleburne were members of the city council on June 8, 1965.

12. Under Section 8 of Cleburne's zoning ordinance, the following uses are all permitted uses in a district zoned R-3, including the district in which the Featherston Street home is situated:

(1) Any use permitted in District R-2.

(2) Apartment houses, or multiple dwellings.

(3) Boarding and lodging houses.

(4) Fraternity or sorority houses and dormitories.

(5) Apartment hotels.

(6) Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.

(7) Private clubs or fraternal orders, except those chief activity is carried on as business.

(8) Philanthropic or eleemosynary institutions, other than penal institutions.

(9) Accessory uses customarily incident to any of the above uses, and located on the same lot, not involving the conduct of a business or industry.

a. There shall be permitted such facilities as are customarily accessory to the operation of an apartment hotel when conducted and entered from within the building.

b. Private or storage garages, located as provided in District R-1 for private garages, may provide space for not more than one motor vehicle for each seven hundred and fifty (750) square feet of lot area. No business occupation or services connected with motor vehicles, except washing occupant autos shall be permitted.

(10) Signs as provided in Section 21.

13. Under Section 16, subdivision 9, of Cleburne's zoning ordinance, "[h]ospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions" are listed as uses requiring the issuance of a special use permit by the Cleburne city council before such use of property in the city may be made.

14. Under Cleburne's zoning ordinance, each special use permit issued is good for only one year.

15. On July 28, 1980, after being told by the responsible city officials of the necessity for doing so if they wished to operate the Featherston Street home as proposed, Jan Hannah and Bobbie Northrop paid the city $40 to apply for a special use permit. The permit was sought to operate the Featherston Street home as a "Residential Care facility for Mentally Retarded Adults".

16. On August 18, 1980, the city's Planning and Zoning Commission held a hearing and voted to deny the special use permit for the Featherston Street home.

17. Although it originally had planned to start operation of the Featherston Street home around October 1, 1980, CLC, in the face of the zoning problems with the city, postponed the planned operational date to November 1, 1980.

18. On September 29, 1980, the City of Cleburne, through its then Assistant City Attorney, Robert T. Miller, Jr., sent a letter to Bobbie Northrop stating that a special use permit was required to operate the Featherston Street home and classifying the proposed use as a hospital for the feeble-minded. Bobbie Northrop received this letter shortly after it was sent.

19. On October 14, 1980, the City Council of Cleburne held a public hearing on the special use permit application for the Featherston Street home and, in a three to one vote, voted to deny the permit application.

20. The Featherston Street home will house thirteen mentally retarded adults and will be operated by CLC as a Level I Intermediate Care Facility for the Mentally Retarded (hereinafter sometimes referred to as an ICF-MR) under extensive regulations and guidelines established and administered by the United States Department of Health and Human Services, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health.

CLC plans to comply with all applicable and valid-statutes, regulations, codes, and ordinances.

21. The structure at 201 Featherston Street is a large, one story frame house containing a living room, an alcove, a dining room, a breakfast room, a kitchen, an attic, a laundry room, four bedrooms, a den, and two baths, with a half bath to be added. It is on a corner lot, and there are front, side, and back yards, as well as a large front porch. Across the street to the north of the Featherston home is a public junior high school which numbers among its students about thirty mentally retarded children between the ages of nine and twenty one years. Directly behind the Featherston home to the south is a two story apartment house. A dentist's office is on the corner northeast of the Featherston home.

22. The people who will live in the Featherston Street home will be men and women eighteen years of age or older who are mildly or moderately mentally retarded. They will be completely ambulatory.

23. The Featherston Street home will have twenty four hour supervision, divided basically into eight hour shifts. Besides handling administrative matters, some cooking, and some cleaning chores, the staff will work with the mentally retarded residents to train and teach them in such areas as kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities. The program for each resident will be flexible, depending on his or her needs, and will be based on an individual program plan prepared for each resident of the group home by an interdisciplinary team. Although a registered nurse will visit the home once a month, there will be no licensed nursing or medical staff in the home or employed by CLC. The residents will have jobs in the community and in a work activity center. They probably will not have private automobiles. Their stay at the Featherston Street home will be voluntary, and its length will be indeterminate.

24. If the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

25. Beginning in fiscal year 1980 (which started on October 1, 1979) and continuing in each of the next two fiscal years, the City of Cleburne has been a recipient of federal financial assistance, including financial assistance under the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 *et seq.* (hereinafter referred to as the Revenue Sharing Act). The city received revenue sharing funds equalling $203,361 in fiscal year 1980, $203,433 in fiscal year 1981, and at least $51,357 thus far in fiscal year 1982.

26. The city's city council is the principal allocator of revenue sharing funds within the city, and it is responsible to the federal Office of Revenue Sharing for the accounting of the receipt and use of revenue sharing funds.

27. Revenue sharing funds have been spent in the following ways, among others: (a) road construction; (b) the purchase of capital equipment for the city's department of public works; (c) the purchase of capital equipment for City Hall; (d) water utility systems; (e) parks and recreation; (f) debt service; and (g) library materials.

28. A civil rights complaint against the City of Cleburne, alleging that the zoning ordinance and the denial of the special use permit that are at issue in this case violate the Revenue Sharing Act antidiscrimination provisions, was filed with the federal Office of Revenue Sharing by Cleburne Living Center, Inc., on its own behalf and on behalf of the mentally retarded potential residents of the Featherston Street home. The Office of Revenue Sharing received the complaint on September 29, 1981, and, as of March 22, 1982, a determination had not been made or issued by that federal office with respect to the complaint.

29. The city council's vote on October 14, 1980, as well as the city Planning and Zoning Commission's earlier vote

on August 18, 1980, to deny a special use permit for the Featherston Street group home was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.

30. Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

31. No group homes or hospitals for persons who are mentally retarded are in Cleburne. One is, however, located in Keene, Texas. Keene is also in Johnson County and is approximately 15 minutes by automobile from Cleburne.

32. Persons who are mentally retarded historically have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements.

33. None of the named Plaintiffs themselves are developmentally disabled.

34. Members of the City Council of Cleburne considered the following factors in their decision to deny Plaintiffs a special use permit for the house at 201 Featherston Street:

a. the attitude of a majority of owners of property located within two hundred (200) feet of 210 Featherston;

b. the location of a junior high school across the street from 201 Featherston;

c. concern for the fears of elderly residents of the neighborhood;

d. the size of the home and the number of people to be housed;

e. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

f. the home's location on a five hundred (500) year flood plain; and

g. in general, the presentation made before the City Council.

35. Plaintiffs were given a full and fair opportunity to voice their views to the City Council concerning their application for a special use permit.

36. In their operation of the group home, Hannah and CLC planned to obtain fees from the residents, and in the event that the residents were unable to pay, subsidies from Medicaid. A Level I Intermediate Care Facility program in Texas is a Medicaid funded program.

37. ICF-MRs are required by the State of Texas to meet certain certification requirements set forth in Plaintiffs' Exhibit 25. CLC preliminarily sought certification of its proposed facility. On or about July 21, 1980 the Texas Department of Health indicated to Mr. David Southern, a one-third shareholder in CLC, that the house at 201 Featherston would be an "adequate" ICF-MR Level I facility provided that certain repairs and modifications were made to the house. Because of the onset of this litigation, however, the requirements for certification were not completed and the Texas Department of Health has stated its intention to toll the one-hundred and twenty day period for the completion of the requirements pending the outcome of the litigation.

38. Subsequent to CLC's application for certification of the ICF-MR in Cleburne, the Texas Department of Human Resources issued new regulations with reference to ICF-MRs. The new regulations (see Defendant's Exhibit 10) state that certification as an ICF-MR will be limited to

"six beds per facility." David Southern claims that state officials have agreed that the new regulation does not apply to the Cleburne facility retroactively.

39. Currently, the house at 201 Featherston will require approximately $8500.00 in repairs and modifications in order to meet certification requirements that have gone into effect since October of 1981.

40. The lease of 201 Featherston from Jan Hannah to CLC requires that the premises be used for "a residential training facility for the adult mentally retarded" and no other purpose. Because of the denial of the special use permit, in January of 1981 Hannah and CLC agreed to modify the terms of the lease. CLC continues to pay Hannah $600 per month for the future right to utilize the lease as originally planned. The original lease called for the payment of $1300.00 per month.

41. There is no evidence that any of the federal funds received by the City of Cleburne pursuant to the Revenue Sharing Act are used to exercise the city's zoning powers. Further, the evidence is clear and convincing that, of the federal funds received by the city, none are used to exercise the city's zoning powers.

42. At all times material to the actions described above, each named individual Defendant was serving in his official capacity as an employee of the City of Cleburne, Texas. Further, at all times material to the actions described above, each named individual acted at all times in the due performance of his official duties and, in good faith, believed that he was carrying out those duties in a proper manner.

II. CONCLUSIONS OF LAW

A. *Introduction*

Plaintiffs predicate this action upon the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 *et seq.*, (hereinafter Federal Revenue Sharing Act) and the

Fourteenth Amendment to the United States Constitution. In particular, Plaintiff CLC claims that Defendants have violated the nondiscrimination provision of the Federal Revenue Sharing Act, 31 U.S.C. § 1242(a) (1),[1] which incorporates the prohibitions found in the Rehabilitation Act, 29 U.S.C. § 794, pertaining to "otherwise qualified handicapped individual[s]."[2] The Defendant City challenges CLC's standing to bring the claim and further asserts § 1242(a) (2) (A)

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[1]31 U.S.C. § 1242(a)(1):

No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualifi d handicapped individual as provided in section 794 shall also apply to any such program or activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or Title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

[2]29 U.S.C. § 749:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

of the Revenue Sharing Act[3] as a defense. All Plaintiffs assert Fourteenth Amendment challenges to the city's zoning ordinance, as written and as applied. In particular, Plaintiffs claim the acts of the Defendants amount to a denial of equal protection, a denial of procedural and substantative due process, and an infringement of Plaintiffs' constitutional rights to travel and freedom of association. Defendants challenge the standing, both constitutional and prudential, of these litigants to assert the claims in question. In the alternative, Defendants assert that the ordinance as written and in operation suffers from no constitutional infirmities.

B. *The Revenue Sharing Act and Rehabilitation Act Claim*

1. *CLC's standing.* CLC raises this claim in its own right and in behalf of the group home's potential residents. The Revenue Sharing Act provision conferring standing for private civil actions states in pertinent part

> "Whenever ... a unit of local government ... has engaged or is engaging in any act or practice prohibited by this chapter [e.g., 31 U.S.C. § 1242 (a) (1)] ... a civil action may be instituted by the person aggrieved ..."

31 U.S.C. § 1244(a). *(emphasis added)* It is undisputed that CLC has properly exhausted its administrative remedies prior to the institution of this action. Congress, of course, may not abrogate the basic Article III standing requirements by statute. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66 (1979). Yet, it is

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[3]31 U.S.C. § 1242(a)(2)(A):

The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subchapter I of this chapter.

apparent that CLC has shown injury in fact which can be redressed if the requested relief is granted. Further, the Court is ever mindful of the remedial purposes of the Act, and is hesitant to give the Act a narrow reading in light of its purposes. It is also without doubt that the interests asserted by CLC in this action fall within the "zone of interests" sought to be protected by the statute. *See Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 25 L.Ed.2d 184 (1970). The Court finds further support in recent Supreme Court cases addressing the issue of statutory standing under the Fair Housing Act, 42 U.S.C. § 3601 *et seq. Havens Realty Corp. v. Coleman*, —U.S.--, 71 L.Ed. 2d 214 (1982); *Gladstone Realtors, supra; Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 34 L.Ed.2d 415 (1972). Defendants contend, however, that none of the Plaintiffs are "otherwise qualified handicapped individual[s]" and that therefore they cannot be "persons aggrieved" within the meaning of the Act. The Court does not read this limitation into the Revenue Sharing Act. Instead, the Court concludes that the term "person aggrieved" indicates a willingness on the part of Congress to extend standing under the Act to all entities which can satisfy traditional Article III requirements. For the reasons set forth below, the Court concludes that CLC satisfies those requirements, including the prudential requirements for *jus tertii* standing in behalf of mentally retarded adults who are potential residents, or "clients" of the group home. In sum, CLC has standing to bring this action in its own right and on behalf of potential residents of the group home.

2. Section 1242(a) (2) (A). Defendants contend that they have demonstrated by clear and convincing evidence that the city's zoning activities are not funded in whole or in part by federal funds provided pursuant to the Revenue Sharing Act. There can be little doubt from the literal language of the Act that its prohibitions are "program specific." *Cf. North Haven Board of Education v. Bell*, —U.S.—, 50 U.S.L.W. 4501 (1982); *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). It is

undisputed that the burden of the section 1242(a) (2) (A) defense falls upon Defendants. Defendants rely exclusively upon Plaintiffs' Exhibit Five (5), a breakdown of the city's expenditures of Revenue Sharing Act funds for the years 1979-1981. The exhibit shows that the city has spent the funds in question upon roads, police, parks and recreation, water and debt service. Apparently not all of the funds have been expended as there is a net positive balance. It is, of course, true that the city council has been the official recipient and "trustee" of the funds. (But this fact, without more, fails to rebut the force of Plaintiff's Exhibit Five. To conclude that the prohibitions against discrimination incorporated into the Revenue Sharing Act from the Rehabilitation Act are applicable to the mere exercise of the city's zoning powers, without any further proof of a nexus between the exercise of those powers and the disbursement of Revenue Sharing Act funds, would eviscerate the "program specific" nature of the Act. In sum, Plaintiffs attempt to place a square peg in a round hole. The Defendants have shown by clear and convincing evidence that the zoning decisions in question were not funded in whole or in part with Revenue Sharing Act funds. Hence these claims will be dismissed on the merits.

C. *The Constitutional Claims*

1. *Standing.* There are four named Plaintiffs in this action who assert standing to litigate the constitutional claims: CLC; Jan Hannah; Johnson County Association for Retarded Citizens; and Advocacy, Inc. Only Hannah and CLC claim a right to money damages. All Plaintiffs seek *jus tertii* standing on behalf of adult mentally retarded citizens who are potential residents at the group home.

CLC and Jan Hannah have clearly shown that they have standing in their own right to assert the constitutional claims. Each has suffered injury in fact as a direct result of Defendants' conduct. Each has a personal stake in the outcome sufficient to assure the "concrete adverseness"

required by Article III. Finally, the requested injunctive relief would ameliorate the particular alleged injury. For these reasons then, *see e.g. Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 50 L.Ed 2d 450 (1977), *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975), *Baker v. Carr*, 369 U.S. 186, 7 L.Ed. 2d 663 (1962), the Court concludes CLC and Hannah may bring this action in their own right.

In addition, the Court is also of the opinion that CLC and Hannah have standing to litigate the constitutional rights of mentally retarded citizens who are potential residents of the proposed group home. Limitations on a litigant's assertion of *jus tertii* standing are not constitutionally mandated, but instead stem from a salutory "rule of self restraint." *Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 397 (1976). CLC and Hannah are virtually indistinguishable from the vendors in *Carey v. Population Services Int'l.*, 431 U.S. 678, 52 L.Ed. 2d 675 (1977), *Craig, supra*, and *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed.2d 349 (1972). On this authority the Court concludes Hannah and CLC are proper litigants to champion the constitutional rights of adult mentally retarded citizens who are potential residents or "clients" of the group home. *See also Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1036 (5th Cir. 1980).

The Court reaches a different conclusion with regard to the Johnson County Association for Retarded Citizens. The record is devoid of any sufficient injury, economic or non-economic, to the Association which would justify its inclusion into this litigation. *See Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636 (1972). Further, there is no evidence that the Defendants' conduct has in any way adversely affected the associational ties of the association's members. *Id.* For these reasons then the Johnson County Association for Retarded Citizens will be dismissed from this litigation.

Advocacy Inc., an independent state agency created pursuant to 42 USC § 6012, also has standing to represent adult

mentally retarded citizens who are potential residents of the group home. *See Goldstein v. Coughlin*, 83 FRD 613 (W.D. N.Y. 1979); *Naughton v. Bevilacgua*, 458 F.Supp. 610, 617 (D.R.I. 1978). *But see Developmental Disabilities Advocacy Center, Inc.*, 521 F.Supp. 365 (D.N.H. 1981). This is especially appropriate where, as is true in the instant case, Hannah and CLC have shown that they are proper litigants according to constitutional and prudential standing requirements. Advocacy Inc., however, is not a proper litigant insofar as it purports to represent the individual interests of Hannah and CLC.

2. *Equal Protection*

Plaintiffs assail the city's zoning ordinance, as written and as applied, on grounds that it denies mentally retarded citizens their rights to equal protection. In accordance with traditional equal protection analysis, the Court first notes that the ordinance in question and the denial of the special use permit do not impact upon any fundamental right guaranteed to Plaintiffs by the United States Constitution. Hence, the Court focuses upon whether the ordinance, as written and as applied, creates a suspect classification. There can be little doubt that Cleburne's zoning ordinance selectively discriminates against the "insane or feeble minded."

The traditional factors for the determination of a suspect class are found in *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 36 L.Ed.2d 16 (1973). Although classification according to mental retardation has never been examined by the Supreme Court, *see Schweicker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981), several lower courts have considered similar issues and arrived at conflicting results. For example, some Courts have rejected the contention that the mentally retarded are a suspect class, *Doe v. Colaulti*, 454 F.Supp. 621, 632 (E.D. Pa. 1978), *aff'd* 592 F.2d 704 (3rd Cir. 1979), *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973), while others have stated that the mentally retarded constitute a "quasi-sus-

pect" class prompting a heightened standard of review. *Sterling v. Harris*, 478 F.Supp. 1046, 1053 (N.D. Ill. 1979), *rev'd on other grounds sub nom. Schweiker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981). *Frederick v. Thomas*, 408 F.Supp. 823, 836 (E.D. Pa. 1976); *Fialkowski v. Schapp*, 405 F.Supp. 946, 958-59 (E.D. Pa. 1975) *(dictum)*. The Court is of the opinion that mental retardation is not a suspect or quasi-suspect class prompting strict or heightened judicial scrutiny. In support of its conclusion the Court adopts the reasoning of the Third Circuit Court of Appeals in *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979). Accordingly, Cleburne's zoning ordinance will be afforded a presumption of validity and upheld if it can be shown to bear some rational relationship to the city's legitimate purposes or interests. *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 40, 55, 36 L.Ed.2d 16, 47, 56 (1973).

Subjected to this limited standard of review, the Court finds that the ordinance, both as written and applied, passes constitutional muster. Certainly the city has a legitimate interest in the location of a group home intended for the purpose of housing thirteen adult mentally retarded citizens. Cleburne does not absolutely bar such concerns in its jurisdiction, but instead merely exercises authority with regard to the location of such a home. The location of the group home raises many legitimate concerns with the city and its residents. Such concerns were voiced in the political process leading to the denial of the special use permit. In particular, the Court focuses upon the legal responsibility of CLC and its residents, as well as the safety and fears of residents in the adjoining neighborhood. Opponents of the special use permit also viewed the number of residents and the particular structure in which they were to be housed with skepticism. It should be noted that subsequent to the denial of the permit, the State of Texas, through its Department of Health Resources, has proposed and adopted Rule 326.35.03.005 which limits its certification of ICF-MRs to those which have six beds per facility or less. In sum, the Court is constrained to conclude that the zoning ordinance

as written and as applied to Plaintiffs, is rationally related to legitimate purposes and interests of the City of Cleburne. It is not arbitrary, capricious or irrational.

3. *Due Process — Police Power*

Plaintiffs contend that the City of Cleburne has exceeded its legitimate police powers by virtue of the zoning ordinance, as written and as applied. In particular, Plaintiffs assert the ordinance and the decision to deny a special use permit bear neither a rational nor substantial relationship to the public health, safety morals, or general welfare. *See e.g. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 71 L.Ed. 303 (1926); *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. 1981); *Wheeler v. City of Pleasant Grove*, 644 F.2d 99, 100 (5th Cir. 1981). The Supreme Court has recently noted that the power of local governments to zone and control land use is undoubted and that its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *Schad v. Borough of Mt. Ephram*, 452 U.S. 61, 68 L.Ed.2d 671, 680 (1981). At this point it is appropriate to distinguish between the interests asserted by Hannah and CLC in their own right as opposed to the interests asserted in their representative capacity. Hannah and CLC have an economic property interest in their own right. In their representative capacity they assert alleged liberty interests on behalf of mentally retarded adults who are potential residents or clients of the group home. In *Schad, supra*, the Supreme Court stated that where property interests are at stake, the ordinance need only be rationally related to legitimate concerns and not deprive the owner of economically viable use of the property. 452 U.S. at 68. Where a protected liberty interest is at stake, the ordinance must be narrowly drawn and further a sufficiently substantial government interest. *Id.*

The Cleburne ordinance, with respect to the individual interests of Hannah and CLC suffers from no constitutional infirmity. As discussed in section 2 above, the ordinance is rationally related to legitimate concerns of the city. Further,

it does not deprive the owners of economically viable use of the property. Accordingly, Cleburne's ordinance is without constitutional infirmity with regard to the property interests asserted by Hannah and CLC.

The exercise of the city's inherent police powers with respect to the liberty interests of potential residents of the group home requires a more lengthy discussion. It is important to bear in mind that all the City of Cleburne has done is to reject a potential site for a group home. As was discussed earlier, the Court has rejected Plaintiffs' contentions that mentally retarded citizens constitute a suspect class. Plaintiffs, however, additionally contend that the ordinance and the decision to deny the special use permit, impinge upon freedoms of association and travel. The Supreme Court has rejected similar contentions in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9, 39 L.Ed.2d 797, 803-04 (1974). Cleburne has merely denied Plaintiffs the right to conduct their business at a specific location in the City. Other locations are available and the Court can find no impingement upon constitutionally guaranteed rights of association and travel. For these reasons, it appears that the "liberty interest" test set forth in *Schad, supra* is inapplicable to the facts of this case. Under the limited standard of review governing mere property interests, the Court has already concluded the ordinance and denial of the special use permit withstand scrutiny. Further, were the court to apply the heightened state of review enunciated in *Schad*, the Court would likewise approve of the ordinance and denial of the special use permit. Cleburne's interest in selectively locating homes for the mentally retarded is substantial — the evidence indicates a concern for not only the rights of adjoining landowners but also for the potential residents of the home. The ordinance is drawn as narrowly as possible to accommodate these interests.

Finally, the Court notes that the facts of this case bear little resemblance to those in *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 52 L.Ed.2d 531 (1977) and *State of Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73

L.Ed. 210 (1928). In *Moore*, the Court emphasized the government's intrusion into the "extended family" living arrangement and concluded that the ordinance in question did little to further the interests claimed by the government. There has been no similar showing in the case at bar. In *Roberge*, the Court concluded that a governmental entity may not constitutionally delegate its entire zoning powers to the owners of adjoining land. Although the city council of Cleburne was heavily influenced by the opinions of adjoining landowners, it is abundantly clear that the city did not completely delegate its police powers. In sum, the Court concludes that the city's conduct was a proper and permissible exercise of its police powers.

4. *Due Process — Vagueness*

Plaintiffs also assail the Cleburne zoning ordinance on grounds that it is impermissibly vague. Nothing that section 27 of the ordinance provides criminal penalties for its violation, Plaintiffs focus the Court's attention to the variance found in the two pertinent sections, §§ 8, 16, with regard to "home" and "hospital". Plaintiffs additionally offer the Court various hypothetical situations which could result in ambiguity under the city's zoning laws as a whole.

At the outset of its analysis, the court notes that on the facts of this case the ordinance does not " 'abut upon sensitive areas of basic First Amendment freedoms'." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 33 L.Ed.2d 222, 228 (1972), [quoting *Smith v. Goguen*, 415 U.S. 556, 572-73, 39 L.Ed.2d 605 (1974)]. Accordingly the law does not demand the greater degree of specificity reserved for the protection of First Amendment freedom. *Parker v. Levy*, 417 U.S. 733, 41 L.Ed.2d 439 (1974). In fact, the ordinance in question is more appropriately characterized as an economic regulatory statute. The standard for its validity is set forth in *Parker, supra*:

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that

> statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation.
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

417 U.S. 733, 757, 41 L.Ed.2d 439, 458 (1974). [*quoting United States v. Nat'l. Dairy Corp.*, 372 U.S. 29, 32-33, 9 L.Ed.2d 561 (1963)]. Under this limited standard of review the Court finds that the ordinance withstands constitutional assault. The Court has little to no difficulty in construing sections 8 and 16 to include the proposed group home despite the minor variance of terms ("home" v. "hospital") therein. A person of ordinary intelligence can reasonably understand that sections 8 and 16 require a special use permit for the operation of a for-profit group home for mentally retarded adults. Any ambiguity is minute.

On the facts of this case, it is beyond peradventure that Plaintiffs received clear and sufficient notice of the city's prohibitions. Accordingly, there is some doubt as to whether Plaintiffs may raise the vagueness claims, especially in the absence of an impingement upon First Amendment freedoms. *See Parker v. Levy*, 417 U.S. 733, 756, 41 L.Ed.2d 439, 458 (1974) (one to whose conduct a statute clearly applies may not successfully challenge it for vagueness). In any event, it is amply clear that the Court need not engage in speculation concerning hypothetical fact situations and their disposition under the ordinance. In short, the Court concludes that sections 8 and 16 of the ordinance are not impermissibly vague. The Court is reminded of the Supreme Court's opinion

in *Grayned, supra* where it was stated that "condemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110, 33 L.Ed.2d at 228-29.

5. *Freedom of Association and Right to Travel.*

By these claims Plaintiffs would have the Court read much more into Defendants' conduct than the record reflects. Cleburne is merely exercising its inherent policy powers to approve or disapprove of the specific location of Plaintiffs' business endeavor. The city does not bar group homes for mentally retarded citizens from its jurisdiction and neither does it inhibit their rights to associate. In sum, mentally retarded citizens are free to live and associate in Cleburne, Texas. The city has merely prohibited the establishment of a for-profit group home for 13 mentally retarded citizens at one specific location. As has been discussed above, the city has a significant and substantial interest in the ultimate location of the home. Plaintiffs' contentions are simply without merit.

D. *Conclusions*

The Court finds no statutory or constitutional infirmities in the Cleburne zoning ordinance, as written and as applied. Accordingly, judgment for Defendants on all claims will enter.

Signed and entered this 4th day of October, 1982.

United States District Judge

U.S. District Court
Northern District of Texas
F I L E D
Oct. 4, 1982
Joseph McElroy, Jr., Clerk
By Pam Hill
Deputy
No. CA3-80-1576-F

In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JUDGMENT

This action came on for trial before the Court, Honorable Robert W. Porter, United States District Judge, and the issues having been duly tried and a decision having been rendered,

It is ORDERED and ADJUDGED that the Plaintiffs, Cleburne Living Center, Inc., et al., take nothing and that the action be dismissed on the merits.

Signed this 4th day of October, 1982.

_____

United States District Judge

C-1

CLEBURNE LIVING CENTER, INC., et al., Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al., Defendants-Appellees.

No. 82-1565.

United States Court of Appeals,

Fifth Circuit.

March 5, 1984.

Suit was brought challenging validity of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district." The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment denying plaintiffs relief, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance could not be challenged under the Act, and (2) zoning ordinance was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis.

Affirmed in part and reversed and remanded in part.

1. United States — 82(2)

Zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" could not be challenged under the Act. 31 U.S.C.A. § 6716.

2. Constitutional Law — 213.1(2)

Three degrees of scrutiny are applied by courts in analyzing statutes challenged under equal protection clause: if a legislative classification disadvantages a "suspect class" or

impinges upon exercise of a "fundamental right," then courts will employ strict scrutiny and statute must fall unless government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest; if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and statutory classification must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand such scrutiny; if neither strict nor intermediate scrutiny is appropriate, then statute will be tested for mere rationality. U.S.C.A. Const.Amend. 14.

3. Constitutional Law — 242.1(5)

Mentally retarded persons are a "quasi-suspect" class and laws discriminating against the mentally retarded should be given intermediate scrutiny. U.S.C.A. Const.Amend. 14.

4. Constitutional Law — 228.2

Zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis. U.S.C.A. Const.Amend. 14.

5. Constitutional Law — 42.2(2)

Organization which aimed to improve welfare and treatment of the mentally retarded, which never identified any individuals who actually desired to live in mental retardates' group home and which failed to prove a sufficient injury to its own interests, lacked standing to challenge constitutionality of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" in its own right or as a representative of its members.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. Thus, blacks were unable to disprove racist stereotypes so long as they were excluded from white neighborhoods and their children were isolated in segregated schools.

Moreover, the effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. Courts have carefully scrutinized legislation that discriminates against politically impotent groups, for under those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

In the present case, we are faced with the isolation of just such a group — the mentally retarded, i.e. persons who possess certain learning disorders[1] but who are to be dis-

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[1]As an expert, Dr. Phillip Roos, stated at trial:

A: Essentially mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract thinking, judgment and problem solving and includes social adjustment and economic productivity.

Q: How do you decide if a person is mentally retarded?

A: We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

. . . . . .

Q: Are there different degrees or levels of mental retardation?

A: Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals whose intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound mental retardation, IQ below 20, these two categories combined include only about five percent of the population.

Trial Transcript at 137-38, 140.

tinguished from the "mentally ill."[2] A zoning ordinance of Cleburne, Texas, excludes mental retardates' group homes from the permitted uses in the "apartment house district." The owners of a proposed group home challenged the ordinance under the Federal Revenue Sharing Act and the Equal Protection Clause of the Fourteenth Amendment. We reject the Revenue Sharing Act claim, because zoning was not a "program or activity" receiving federal funds. In evaluating the Equal Protection claim, we hold that mental retardates constitute a "quasi-suspect" class; and, therefore, we test the ordinance according to the "intermediate" level of scrutiny established by the Supreme Court. Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause.

I. FACTS

In July, 1980, Jan Hannah purchased a house at 201 Featherston Street in Cleburne, Texas. Hannah is the Vice President and part-owner of Cleburne Living Centers, Inc. ("CLC"), a Texas corporation organized for the purpose

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[2]Dr. Roos also explained that mental retardation is not a mental illness.

> Q: Is mental retardation a type of mental illness?
>
> A: No, sir. It's an entirely different condition requiring entirely different approaches.
>
> Q: Well, how do they differ?
>
> A: Mental retardation is a problem of a deficit in intellectual development and social adaption. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.
>
> Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur anytime in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

Trial Transcript at 138-139.

of establishing and operating supervised group homes for the mentally retarded. Hannah bought the Featherston house for the purpose of leasing it to CLC for the operation of a group home, classified as a Level I Intermediate Care Facility.

The home would house thirteen men and women who are mildly or moderately retarded. They would receive twenty-four hour supervision from CLC staff members, working eight-hour shifts. In addition to handling some cooking and cleaning, the staff would work with the mentally retarded residents to train them in such skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities."[3] An interdisciplinary team of staff workers would prepare an individualized program for each resident, based on his or her particular needs. The residents would have jobs in the community and in a work activity center. They would probably not have private cars. Their stay at the home would be voluntary, and the length of the stay indeterminate.

As a Level I Intermediate Care Facility, the Featherston home would be subject to extensive regulations and guidelines established and administered by the United States Department of Health and Human Resources, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances. *Cleburne, supra* note 3, at 6, Finding 20.

For mentally retarded persons living in the 1980's, the existence of group homes is critical to assimilation into the normal culture. As the trial court found,

> Group homes currently are the principal community living alternatives for persons who are mentally

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[3] *Cleburne Living Center v. City of Cleburne*, No. CA 3-80-1576-F, slip op. at 7, Finding 23 (N.D.Tex. April 16, 1982).

> retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne Living Center v. City of Cleburne, *supra* note 3, at 9, Finding 30. At present, there are no group homes or hospitals for the mentally retarded in Cleburne. One is located in Keene, Texas, approximately 15 minutes by automobile from Cleburne.

II. THE ORDINANCE.

Section 8 of Cleburne's zoning ordinance lists the permitted uses in a district zoned R–3:

> 1. Any use permitted in District R–2.
>
> 2. Apartment houses, or multiple dwellings.
>
> 3. Boarding and lodging houses.
>
> 4. Fraternity or sorority houses and dormitories.
>
> 5. Apartment hotels.
>
> 6. *Hospitals*, sanitariums, nursing homes *or homes for* convalescents or aged, *other than for the* insane or *feebleminded* or alcoholics or drug addicts.
>
> 7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
>
> 8. Philanthropic or eleemosynary institutions, other than penal institutions.
>
> 9. Accessory uses customarily incident to any of the above uses. . . .

Id. at 4, Finding 12 (emphasis added).

Section 16, subdivision 9, of the same ordinance requires that special use permits be obtained for "*hospitals for the*

insane or *feeble-minded*, or alcoholic or drug addicts, or penal or correctional institutions" that are to be operated anywhere in the city. *Id.* at 5, Finding 13 (emphasis added). Because the Featherston house is located in an R-3 zone and, more generally, because it is located anywhere within Cleburne, its use as a group home is not automatically permitted but requires a special use permit from the Cleburne City Council. Under the zoning ordinance, each special use permit is valid for only one year; so the owners of the Featherston house would have to reapply year after year.

III. PROCEEDINGS BELOW

On July 28, 1980, Hannah applied for a special use permit. The Cleburne Planning and Zoning Commission held a hearing and denied the permit. On October 14, 1980, the City Council of Cleburne held a public hearing on the permit application and again voted (3-1) to deny the permit. The Council members considered the following factors:

1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;

2. the location of a junior high school across the street from 201 Featherston;

3. concern for the fears of elderly residents of the neighborhood;

4. the size of the home and the number of people to be housed;

5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

6. the home's location on a five hundred (500) year flood plain; and

7. in general, the presentation made before the City Council.

After exhausting administrative remedies, Hannah and the CLC sued for injunctive relief and damages, in the United States District Court for the Northern District of Texas. They were joined by the plaintiffs Johnson County Association for Retarded Citizens (JCARC) and Advocacy, Inc. in asserting the constitutional rights of mentally retarded

persons who were potential residents of the facility. JCARC is an organization that aims to improve the welfare and treatment of the mentally retarded. Advocacy, Inc. is a non-profit corporation that provides legal services to developmentally disabled persons.

The defendants in the suit include the City of Cleburne and individual city employees and council members. After a bench trial, the district judge entered judgment denying the plaintiffs relief on each of the grounds they had claimed. This appeal follows.

IV. ISSUES ON APPEAL

The plaintiffs raise various challenges to the zoning ordinance on its face and as applied. They argue, first, that the ordinance and the special use permit denial violate the Revenue Sharing Act which prohibits discrimination against "otherwise qualified" handicapped people. 31 U.S.C. §1242(a)(1) (1982), *recodified* at 31 U.S.C.A. § 6716(b)(2) (1983).

The plaintiffs also claim that the ordinance and its application violate the Equal Protection and Due Process clauses of the Constitution.[4] We find the Revenue Sharing Act claim unconvincing in the circumstances of this case. However, we hold that the Cleburne ordinance, both on its face and as applied, denies equal protection. Therefore, we need not address the other constitutional claims. The one tangential issue that is worthy of note is the defendants' argument that JCARC lacks standing to prosecute this suit. Given the specific facts of this case, we agree. That

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[4]The plaintiffs assert that the ordinance violates Due Process in two ways. The distinctions drawn in the statute are allegedly arbitrary and capricious, thus failing to meet the minimal rationality requirements set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). Moreover, the plaintiffs allege that the statute is unconstitutionally vague. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

determination does not affect our decision on the merits, however, for the other plaintiffs remain in the suit.

V. REVENUE SHARING ACT

[1] The plaintiffs argue, first, that the zoning function of the Cleburne City Council is within a "program or activity" subject to the provisions of the Revenue Sharing Act. 31 U.S.C.A. § 6716 (1983). We disagree. As the trial court held, clear and convincing evidence proved that federal funds were not used to finance the zoning activities of the City Council. *See* 31 U.S.C.A. § 6716(c)(1); *see also North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982) ("program or activity" language in Education Amendments of 1972 makes their coverage program-specific); *Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir.1981) (receipt of federal financial assistance by multiprogram entity, for application to certain programs or activities, does not bring entire entity within the reach of Section 504 of the Rehabilitation Act); *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir.1969) (multiple programs in Title VI context).

The plaintiffs claim, however, that the City Council itself is an activity receiving federal funds, because it decides which specific city programs will ultimately receive the monies. Therefore, every action of the City Council (including zoning) is subject to the requirements of the Revenue Sharing Act. *Cf. Grove City College v. Bell*, 687 F.2d 684 (3d Cir.1982), *cert. granted* ..... U.S. ....., 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983) (entire college a "program or activity" in Title IX case). We are not willing to make that leap in the circumstances of the case. Even if we assume that the City Council's function in disbursing funds subjected those decisions to the Revenue Sharing Act, there was no apparent link between that function and the Council's function in making zoning decisions. These were two entirely separate powers and should be considered separate programs.

We do not hold that a City Council could *never* be a single program or activity. We merely hold that those conditions do not exist in this case.[5]

VI. EQUAL PROTECTION

[2] The real problem with the Cleburne ordinance is that it denies equal protection both facially and as applied. In recent years, the formulaic analysis of Equal Protection claims has produced three degrees of scrutiny for courts to apply in analyzing challenged statutes. The levels are generally called "strict scrutiny," "intermediate" or "heightened" scrutiny, and "rational review," *see Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394-96, 72 L.Ed.2d 786 (1982); the choice among the three levels depends upon the nature of the statute in question. If the legislative classification disadvantages a "suspect class"[6] or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny. *Plyler v. Doe*, *supra*, 102 S.Ct. at 2394-95 and nn. 14, 15. The statute must fall unless the government can demonstrate that the "classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 2395.

If the "classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties,"

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[5]This case is distinguishable from *Grove City College*, *supra*, where the college was considered a single "program or activity" under the Educational Amendments of 1972 because students received federal tuition aid. The aid, which was not earmarked for any specific program, 687 F.2d at 696-97, would conceivably have ultimately funded every program in the college; but the case reveals no attempt by the school to prove that certain programs were not funded. Instead, the college argued that the funding was indirect, going to students rather than any program of the college itself. *Id.*

[6]The courts have identified a number of classifications as inherently suspect. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (classification by race); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage).

id., it will be tested under intermediate scrutiny. Such difficulties arise, for example, when a statute discriminates against a class which shares some of the characteristics of the suspect classes. *See id.* at 2395-97; *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S. Ct. 1459, 1463, 52 L.Ed.2d 31 (1977); Tribe, *American Constitutional Law*, 1090 (1978). To withstand intermediate scrutiny, the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); *see also Plyler v. Doe*, *supra*, 102 S.Ct. at 2395, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality. We "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, *supra*, 102 S.Ct. at 2394.

[3] In deciding the appropriate level of scrutiny in this case, we note that the plaintiffs have identified no fundamental rights that are impaired by the Cleburne ordinance. Our analysis, then, is limited to whether the class of mentally retarded persons is suspect or at least possesses sufficient characteristics of a suspect class to warrant intermediate review.

Although some district courts have discussed this issue,[7] we can find no appellate opinions directly deciding the

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[7]*See Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 473, 490 (D.N.D. 1982) (intermediate scrutiny appropriate for classifications discriminating against mentally retarded persons); *Fialkowski v. Shapp*, 405 F.Supp. 946, 957-59 (E.D.Pa. 1975) (same) (dictum); *cf. Frederick L. v. Thomas*, 408 F.Supp. 832, 836 (E.D.Pa.1976) (classification discriminating against learning disabled should be tested under intermediate scrutiny) *(dictum)*. *But see New York State Assoc. for Retarded Children v. Rockefeller*, 357 F.Supp. 752, 762 (E.D.N.Y.1973) (inmates of state institution for mentally retarded not a suspect class); *Developmental Disabilities Advocacy Center v. Melton*, 521 F.Supp. 365, 371 (D.N.H.

proper characterization of mentally retarded persons for Equal Protection analysis.[8] Therefore, we face the issue as one of first impression.

The courts have identified several indicia of the suspect classes. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973), the Supreme Court considered whether

> the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Accord, Plyler v. Doe, supra, 102 S.Ct. at 2394-95 n. 14; *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1964); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed. 1234 (1938). In *Plyler v. Doe, supra*, the Court also noted that

> [s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative

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1981) (same); *Anderson v. Banks*, 520 F.Supp. 472, 512 (S.D.Ga. 1981) (mentally retarded persons not a "quasi-suspect" class). Some cases have discussed whether mentally *ill* persons are a suspect or "quasi-suspect" class. *See, e.g., Doe v. Colautti*, 592 F.2d 704, 710 (3rd Cir. 1979) (mentally ill not a suspect class); *Sterling v. Harris*, 478 F.Supp. 1046, 1056 (N.D.Ill.1979), *rev'd other grounds sub nom; Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (mentally ill a "quasi-suspect" class). However, mental illness is distinguishable in significant ways from mental retardation, as we discuss *infra* at note 10. Thus, the mental illness cases offer at best only weak analogies to the case at bar.

[8] *Romeo v. Youngberg*, 644 F.2d 147, 163 n. 35 (3d Cir. 1981) *(en banc)* does suggest, however, that mentally retarded persons might be a "discrete and insular" minority deserving heightened scrutiny. See *infra* at 14. *Cf. Abrams v. 11 Cornwall Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (discrimination against mentally retarded persons is invidious).

> rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.

102 S.Ct. at 2394-95 n. 14.

Finally, if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979); *cf. Plyler v. Doe*, *supra*, 102 S.Ct. at 2396 (minor children of illegal aliens are not in this country voluntarily and, therefore, are not comparably situated to their parents).

Applying these tests to the case at bar, we conclude that although mental retardates are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny. Discrimination against the mentally retarded is likely to reflect deep-seated prejudice. They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools in the United States. In addition, the Eugenic Society of America fought during the first half of this century to have retarded persons eradicated entirely through euthanasia and compulsory sterilization. *See Pennsylvania Assoc. of Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294 (E.D.Pa. 1972). Euthanasia was rejected; but thirty-two states have had statutes providing for the sterilization of retarded individuals. *Id.* at 294 n. 42; *Falkawski v. Shapp*, *supra* note 7, at 959 n. 9; O'Hara & Sanks, Eugenic Sterilization, *45 Geo.L.J. 30* (1956); *see also Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584,

71 L.Ed. 1000 (1927) (upholding Virginia compulsory sterilization law.)[9]

Mental retardates have been segregated in remote, stigmatizing institutions. *Cleburne Living Center v. City of Cleburne*, *supra* note 3, at 9, Finding 32, Trial Transcript at 142; and when permitted in society, they have often been subjected to ridicule, *id.* at 141. Once-technical terms for various degrees of retardation — e.g. "idiots," "imbeciles," "morons" — have become popular terms of derision.

These forms of mistreatment have perpetuated the historical misunderstanding of mental retardation and led to popular fears and uncertainty. The Cleburne ordinance discriminates between the mentally retarded and other groups — e.g. the elderly — that also require supervision but may establish group homes in the R-3 district without a special use permit. This distinction is likely to reflect the deep-seated historical prejudice against the mentally retarded.

In addition, mentally retarded persons have lacked political power. The trial court found that they "historically have been subjected to exclusion from the political process. . . ." *Cleburne*, *supra* note 3, at 9, Finding 32. Indeed, as of 1979, most states disqualified mentally retarded individuals from voting. Note, *Mental Disability and the Right to Vote*, 88 *Yale L.J.* 1644 (1979).[10] Furthermore, political organiza-

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[9]The attitude of the past can be read in the words of Justice Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.

Id. 274 U.S. at 207, 47 S.Ct. at 585.

[10]In Texas, both the state constitution and election code provide:

> The following classes of persons shall not be allowed to vote in this state, to wit:
>
> . . . . .

tions for the mentally retarded have emerged only recently and still possess relatively little power. As the Third Circuit declared n *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir.1981) (*en banc*):

> The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed.2d 1234 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See J. Ely, Democracy and District*, 135-79 (1980).

Id. at 163 n. 35.

Finally, the mentally retarded deserve special consideration because their condition is immutable. Dr. Phillip Roos explained at trial that mental retardation is "irreversible." "[T]here may be some amelioration, but to date it is not a curable condition." Trial Transcript at 139.

Second: Idiots and lunatics.

Tex. Const. art. VI, § 1; Tex.Elec.Code Ann. art. 5.01 (Vernon Supp 1982). A 1982 opinion of the Texas Secretary of State limited that language to mentally retarded persons who have been adjudicated incompetent. Election Law Opinion DAD-27 (1982). The opinion relied in large part on the Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547-300, § 2(c) (Vernon Supp. 1982).

We do not believe, however, that the mentally retarded have suddenly become politically powerful in Texas. They are still a relatively small bloc, notwithstanding the existence of organizations like the Johnson County Association of Retarded Citizens. Moreover, their right to vote was unclear as late as 1982. The Secretary of State opinion was necessitated by a local judge's decision to bar from the polls a mentally retarded person who had not been adjudicated incompetent. *Id.* The powerlessness of the minority is especially clear in our case, for the Cleburne Ordinance was passed in 1965, long before the Secretary of State Opinion or the Mentally Retarded Persons Act.

The combination of these factors — historical prejudice, political powerlessness, and immutability — calls for heightened scrutiny of classifications discriminating against the mentally retarded. We are not prepared to say that they are a full-fledged suspect class, however. Strict scrutiny has been reserved for classifications, such as race, that "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, *supra* 102 S.Ct. at 2394-95 n. 14. Though mental retardation is irrelevant to many policies, it *is* a relevant distinction in some cases. For example, learning difficulties may have a bearing on the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. Therefore, we hold that mentally retarded persons are only a "quasi-suspect" class and that laws discriminating against the mentally retarded should be given intermediate scrutiny.[11]

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[11]In deciding that classifications against the mentally retarded deserve heightened scrutiny, we express no view about classifications involving the mentally ill. Some courts and commentators have suggested that mentally ill persons are a suspect or quasi-suspect class. See, *e.g.*, *Sterling v. Harris*, *supra*, 478 F.Supp. at 1053; Note, *Mental Illness: A Suspect Classification*, 83 Y.L.J. 1237 (1974); but see *Doe v. Colautti supra*. The Fifth Circuit has not addressed this issue, except to say in *dictum* that the mentally ill are not a suspect class. See *Benham v. Edwards*, 678 F.2d 511, 515 n.9 (5th Cir. Unit B 1982). The Court explicitly declined to decide whether intermediate scrutiny would be appropriate. *Id.*

In any event, mental retardation is functionally different from mental illness; see *supra* note 2; and the differences cut in favor of heightened scrutiny for the retarded. Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental retardation. More important, mental retardation, unlike many mental illnesses, is an immutable disorder. The mentally retarded cannot be cured. *Id.*

Finally, mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation. The court in *Doe v. Colautti*, *supra*, 592 F.2d at 711, refused to grant extraordinary protection to the mentally ill:

> a class that is "large, diverse, [and] amorphous. . . . " The concept of mental illness is susceptible to much dispute, and the category encompasses a whole range of disorders, varying in character, and effects.

Mental retardation is much more narrowly defined. See *supra* note 1.

We note that heightened scrutiny is particularly appropriate in the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded. See *Plyler v. Doe*, *supra*, 102 S.Ct. at 2398; *Tribe*, *supra* at 1089-90. In *Plyler*, the Supreme Court addressed a Texas statute which withheld from local school districts any funds for the education of children who were not legally admitted into the United States. The statute also authorized local districts to exclude such children from the public schools. 102 S.Ct. at 2389. The Court held that heightened scrutiny was appropriate not only because the children shared some of the characteristics of a suspect class, but also because they were denied an important benefit. Education is not a fundamental right, *id.* at 2397, *San Antonio Independent School District v. Rodriguez*, *supra*, 93 S.Ct. at 1297; but it is important in helping such children overcome the bias against them and participate in American society

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

102 S.Ct. 2398.

In the same way, the exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. The trial court found that

> [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for per-

> sons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne, supra at 9, Finding 30. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

The Ninth Circuit has held in an analogous case that heightened scrutiny is appropriate. *See J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir.1983). The Court reviewed a local zoning ordinance that required a special use permit before the establishment of a group home for former mental patients[12] in the R-2 zone.[13] Intermediate scrutiny was held to be applicable because the class shared some of the characteristics of suspect classes and because the ordinance denied important benefits:

> We note . . . that the benefits the ordinance restricts are the former mental patients' access to housing and rehabilitative services. While they are not fundamental rights, they like education at issue in *Plyler*, are essential to individuals' full participation in society. Indeed, for former mental patients, a reintegration into society accomplished through living, in a moderately structured setting in a residential neighborhood is an essential part of therapy.

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[12]We are not suggesting that former mental patients are identical to the mentally retarded. *See supra* notes 2, 11. However, many of the problems (e.g. the community's fear and distrust) that face mental patients in returning to society are similar to problems faced by the mentally retarded.

[13]The Tacoma ordinance was arguably less problematic than the Cleburne ordinance, because the Tacoma law provided specific conditions for the issuance of a permit. See *id.* at 1130 n. 5. The Cleburne ordinance has no guidelines at all.

Id. at 1129.[14]

For the same reasons, we think that intermediate scrutiny is particularly appropriate in reviewing an ordinance[15] that restricts the availability of group homes for the mentally retarded.

[4] In applying that test, we hold that the ordinance is unconstitutional both on its face and as applied. First, the provision itself does not substantially further any important governmental interests. The problem lies not with the interests themselves but with the relevance of the ordinance to those interests. We will assume that all of the legislative goals asserted by the City of Cleburne are substantial. In each instance, however, there is not a sufficiently close correspondence between the goal and the ordinance's means

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[14]Incidentally, although the court relied on these arguments to apply heightened scrutiny, it explicitly left open

> the possibility that, in a case with a record more fully developed as to the characteristics and status of former mental patients, a conclusion that they indeed constitute a suspect class might be warranted.

Id. at 1129.

[15]The City has argued that the statute does not actually exclude all such group homes but merely requires one additional procedural hurdle. In effect, there is only a possibility of exclusion. Arguably, then we should not adopt heightened review in testing the *facial* validity of the statute as opposed to its application.

Yet the same possibility obtained in both *Plyler* and *City of Tacoma*. The Texas Ordinance in *Plyler* authorized but did not require local school districts to exclude undocumented children. Indeed, the Tyler Independent School District had enrolled such children free of charge until 1977 when it required a tuition fee. 102 S.Ct. at 2389 n. 2. The Court tested the provision, however, with more than minimal scrutiny because of the potential exclusion.

More to the point, the zoning ordinance in *City of Tacoma*, like the Cleburne Ordinance, did not exclude all group homes but merely required a special use permit. The Ninth Circuit tested the statute under intermediate scrutiny again because of the possible denial of an important benefit.

Thus, the possible exclusion here is suffcient to justify our considering the importance of the restricted benefit when we analyze the statute on its face.

of achieving it. *See Craig v. Boren, supra,* 429 U.S. at 197, 200-204, 97 S.Ct. at 460 (requiring closer fit between legislative objective and statutory means than is required under rational review); Tribe, *supra* at 1083 & n. 10 (same); *see also Trimble v. Gordon, supra,* 430 U.S. at 770-71, 97 S.Ct. at 1465-66; *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 1904 n. 20, 1911 n. 48, 48 L.Ed.2d 495 (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 799-80 n. 13, 39 L.Ed.2d 52 (1974). The standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly underinclusive.

For example, the City claims that the objectives of the statute were:

1. to avoid undue concentrations of population;

2. to lessen congestion in the streets;

3. to ensure safety from fire and other dangers; and

4. to protect the health, safety and welfare of the City's population — in particular

   a. to protect the serenity of the existing neighborhoods,

   b. to protect neighbors from harm; and

   c. to protect the mental retardates themselves by providing an appropriate living environment.

See Brief of Appellees at 21-24.

The ordinance is irrelevant to the achievement of the first two asserted objectives. The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded. *Cleburne, supra* note 3 at 7, Finding 24. Therefore the ordinance does not control population at all. It merely controls the learning skills of the population.

The ordinance likewise does not control traffic flow. The government has not shown that mentally retarded persons

drive more cars or receive more visitors than other people. There is no basis for concluding that traffic will be any more congested because the residents of the Featherston house are mentally retarded. One might argue (though the City has not taken this position) that traffic would be more congested because mentally retarded persons would wander into the streets. Other people do the same, however; and there is no evidence in the record that mentally retarded persons are unusually prone to cause such a hazard. We reject traffic congestion as a goal that is furthered by the ordinance.

The record also fails to support the claim that the ordinance protects the serenity of neighborhoods and shields neighbors from harm. The City produced only one story of a mentally retarded person who had caused a disruption: he had removed some mail from a neighbor's mailbox but later returned it. Moreover, this event did not even take place in Cleburne. *See* Trial Transcript at 111. Nothing in the record indicates that mentally retarded persons — and particularly those admitted into group homes — are more disruptive or dangerous than other people. On the contrary, Dr. Roos testified that the mailbox incident was not common behavior in moderately retarded persons and was just as possible in most children. *Id.* at 164. Yet public schools and homes for delinquent children are permitted in the zone. The discrimination between the mentally retarded and other persons is not explained by recourse to neighborhood serenity.

Finally, as to "safety from fire and other dangers," the City does not clarify whether mentally retarded persons will cause the dangers or require special city services when accidents occur. In either event, the City has not proved a substantial relationship between the goal and the ordinance. There is no evidence in the record that mentally retarded persons are more likely than other people to light fires (or cause other hazards). It is conceivable that they might require special care in an emergency. However, the City has never shown that they require more supervision than

groups like the elderly whose nursing homes are permitted in the R-3 zone without permits. Nor has the City shown that the existing supervisors in the Featherston house would provide inadequate care. To treat all homes for the mentally retarded as non-permitted uses is an excessively blunt instrument for achieving fire safety. The City could more appropriately solve this problem by requiring a certain number of caretakers per resident or by setting limits on occupancy. Such requirements already exist in federal and state regulations. *See Cleburne, supra* note 3, at 6, Finding 20. There is no reason why the City cannot be more specific in delineating its concerns.

The same objection can be raised to the City's general claim that the ordinance serves to protect the health, safety, and welfare of mentally retarded persons — by insuring, for example, that group homes are well constructed, safely located, and not over-crowded. The City could serve these interests in a much more direct manner by setting specific requirements to guide the judgment of the City Council. The alternative (embodied in the Cleburne ordinance) of giving the city council complete discretion to bar all group homes is too dangerous. There is too great a potential for blanket discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home. We cannot sanction such unbridled discretion in dealing with a class that has suffered a history of mistreatment and political impotence. The Cleburne provision requiring a special use permit for mental retardates' group homes is facially invalid under the Equal Protection Clause.

That holding alone would be sufficient to decide this case. The ordinance provision was unconstitutional; therefore it could not be invoked to exclude the Featherston Home. However, even if the statute were facially constitutional, the City Council's decision in this case would have violated equal protection. Again, the decision must be tested under intermediate scrutiny; and we hold that the denial of a permit for the Featherston Home did not substantially

further any important government interest justifying the discriminatory classification.

The factors going into the Council's decision were:

(a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;

(b) the location of a junior high across the street from 201 Featherston;

(c) concern for the fears of elderly residents of the neighborhood;

(d) the size of the home and the number of people to be housed;

(e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

(f) the home's location on a five hundred (500) year flood plain; and

(g) in general, the presentation made before the City Council.

Cleburne, supra note 3, at 9-10, Finding 34.

The final factor (g) is too ambiguous to justify discrimination; and two more (a and c) do not serve substantial interests. The prejudices and fears of neighbors are not in themselves ligitimate bases for discrimination.

The location of a junior high across the street from the Featherston Home (factor b) raises an arguable concern that the students would tease or abuse residents of the home. However, that danger seems minimal, since about thirty students are themselves mentally retarded. *Cleburne, supra,* note 3, at 6, Finding 21. More important, the very purpose of living in a community group home is to confront and learn to handle society's obstacles. If we accept that the hostility of junior high students is a substantial concern, then any hostility may become the justification for denying

a use permit. In effect, prejudice becomes its own excuse. We cannot accept that as a substantial interest, particularly given the speculative, unsupported nature of the City's allegations.

The size of the home and the number of people to be housed are important interests; but they are not substantially served by denying the permit in this case. The Featherston Home has four bedrooms and two baths and will house thirteen people. The structure contains 2700 square feet and is located on a lot that is 156 feet long by 103 feet wide. Citing a recent Texas regulation that limits group homes to six residents, the City argues that residents of the Featherston Home will be too crowded. The regulation only applies to applications made after May 1, 1982 and, therefore, does not govern the Featherston Home; but the City feels that the regulation indicates the needs of mentally retarded persons. However, the existence of the regulation does not explain Cleburne's discrimination between the mentally retarded and others. The City never justifies its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot. Moreover, assuming that the City would be comfortable with six residents, it has never justified the difference between six and thirteen persons. The only discussion of this question came from Dr. Roos who knew of "no research evidence indicating that a group home with six does a better job than a group home with fifteen." Trial Record at 161. In sum, the City has never proven that the mentally retarded have unusual space needs or that denying the Featherston permit serves that interest.

The stated goal of insuring CLC's legal responsibility for the actions of its residents is not sufficiently important. Nowhere in the briefs or the record do we find an explanation why mental retardates alone must prove their financial solvency to live in Cleburne. Nor do we find any explanation of how CLC fell short.

Finally, the argument that the Home would be in a 500 year flood plain seems somewhat strained. Though the safety of the residents is important, the danger of a flood every five hundred years is not particularly great.

In sum, none of the proffered reasons for denying the Featherston permit substantially served an important government interest. The application of the ordinance denied equal protection.

VII. STANDING OF JCARC

[5] The Johnson County Association of Retarded Citizens has asserted standing to litigate this suit in its own right and as a representative of its members. The trial court held that the association had failed to prove any injury to itself or to its members. Therefore, it failed to satisfy the requirements for standing.

We affirm, for the reason given by the trial court. The JCARC has not shown any injury to its members. Although it claims that some of its members are potential residents of the Featherston Home, it has never identified any individuals who actually desire to live there. Thus, it is impossible to tell if any of the members were actually harmed by the City Council's action. *See Warth v. Seldin;* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

Nor has the JCARC proven a sufficient injury to its own interests. The association's activities include "promoting the general welfare of mentally retarded people, fostering the development of programs on their behalf, and advising and aiding parents of mentally retarded persons in the solution of their problems in this area." Brief of Appellant at 3. In particular, the JCARC favors the development of group homes; and the City Council's decision allegedly impairs this interest. However, the association's interest seems no different from that of the low-income housing association denied standing in *Warth v. Seldin, supra.* The injury to the JCARC's "abstract social interests" is too intangible to

justify standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

The association would have standing if it proved that (1) it provides counseling and referral services for mentally retarded persons seeking group homes, and (2) it has had to devote significant resources to combatting the City Council's discrimination. *Id.* However, it has not yet proven any drain on its resources, so it does not come within the *Havens* formula.

In future cases, the JCARC can put forth evidence proving such an injury, or it can show that one of its members actually desires to live in the contested group home.[16]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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[16]Admittedly, we have provided the JCARC with a formula for establishing standing in its future litigation. There is high precedent for giving such advice. See *Sierra Club v. Morton, supra,* 92 S.Ct. at 1366.

CLEBURNE LIVING CENTER, INC., et al., Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al., Defendants-Appellees.

No. 82-1565.

United States Court of Appeals, Fifth Circuit.

July 6, 1984.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1984, 5 Cir., 1984, 726 F.2d 191)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge, with whom BROWN, GEE, REAVLEY, JOLLY and DAVIS, Circuit Judges, join, dissenting.

I respectfully dissent from the denial of a rehearing en banc.

The panel has made a holding no other federal appellate court has: that state regulations treating the mentally retarded differently than others are on that account facially invalid if they fail to meet the "intermediate" or "heightened" scrutiny test applicable to classifications such as those based on gender or legitimacy, notwithstanding that the regulatory distinctions in question are rationally based and impair no fundamental rights.[1] I believe this holding not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration.

It is both a cliche and a fundamental truth that equality does not demand treating materially different conditions in the same manner. Hence, where fundamental rights are not concerned, a threshold requirement for scrutiny beyond the rational basis level should be that the group singled out for special treatment be not generally, or with respect to the field of regulatory subject matter under consideration, significantly different, as a result of its defining characteristics, from the rest of society in terms of its needs and abilities to function. Where difference in treatment should rationally be expected, it is indeed an ill-advised rule that treats its presence as quasi-suspect.

Classification based on mental retardation is generically different from that based on gender or legitimacy, the prototypical "quasi-suspect" classifications. Under the broadly held and judicially accepted view, women and illegitimates are not generally different from the rest of society in terms of their needs and abilities to function. Women have as much need for, and ability to benefit from, the same kinds

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[1]The district court held the regulatory distinctions here at issue to be rationally based. The panel did not reach that question, and hence neither does this dissent, which is directed only to the rule announced by the panel. The panel likewise held there was no impairment of fundamental rights.

of education as men,[2] and illegitimate children have as much need for, and can equally benefit from, parental support as legitimate children. Thus, for example, governmental distinctions between the sexes respecting education, or between legitimate and illegitimate children respecting the obligation of parental support, are quasi-suspect. The mentally retarded present a wholly distinct situation.[3] They *are* materially different from the rest of society, and are so as a result of their class-defining characteristics.

The characteristics which define the retarded as a class — the presence from birth or early childhood of an incurable, though ameliorable, significant deficit in intellectual development and social adaptation — bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions, and are highly relevant to proper legislative goals in most respects.

And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill. This, of course, was recognized by plaintiffs' expert in the present case in his testimony quoted in the panel opinion (note 12) that mental retardation and mental illness are "conditions requiring entirely different approaches." It is likewise obvious that entirely different approaches are also required in respect to the retarded and the very young, or the very old, or the physically ill.

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[2]The same may be said with respect to legal and illegal alien children.

[3]As observed in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973):

> ". . . what differentiates sex from such *nonsuspect statuses* as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.*" (Emphasis added.)

Clearly that, too, is recognized by the plaintiffs here, who seek to create an environment *restricted* to and specifically designed for the retarded. Plaintiffs here do not want a children's day-care facility or a hospital. The retarded, *as such*, are not hospitalized or placed in nursing homes. In short, the retarded, often with minds at or below third-grader level in the bodies of otherwise relatively healthy adults, present a *special* set of needs, requirements, and problems unique to their condition.

As "entirely different approaches" are required respecting the retarded, are we nevertheless to treat the presence of difference in approach as "quasi-suspect"? It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether or not the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened" scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"?[4] Are we to review as "quasi-suspect" the failure of governmental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared?

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[4]In Justice Brandeis' famous words: "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The panel opinion appears to regard the integrative model as the preferred method of aiding the retarded. *See* At 199 ("Isolated from normal community patterns, they can never hope to adapt."). Are other models constitutionally "quasi-suspect"?

Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the nonretarded, but where judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded.

The factors relied on by the panel for its determination that the retarded are a quasi-suspect class[5] should not alone suffice for such purpose, absent the class' meeting a threshold level of lack of significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either generally or in respect to the regulatory area under consideration. The panel factors in no way mitigate the contradictory nature of "quasi-suspecting," as being unequal, the different treatment of conditions that are significantly different. Indeed, the panel factors tend to increase in strength with the degree of retardation and the concomitant increased appropriateness of disparate treatment.[6] Where

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[5]The factors cited by the panel (At 197-98) may be summarized as follows: (1) "likely to reflect deep-seated prejudice"; (2) "history of unfair and often grotesque mistreatment," including "universally denied admittance into public schools" (until 1970's), segregation "in remote, stimatizing institutions," and "often been subjected to ridicule"; (3) "have lacked political power"; (4) "their condition [though ameliorable] is immutable."

[6]I believe it fair to assume that, to the extent the public tends to react toward the retarded differently than toward the nonretarded, the differences in reaction are greatest with respect to those whose retardation is more pronounced, and least with respect to the marginally retarded (those with, say, an IQ at or only slightly below 70). Certainly, the marginally retarded are far more likely to attend public schools, and far less likely to be "in remote, stigmatizing institutions," than those with more pronounced retardation. In terms of their ability to be trained so as to increase their social adaptive behavior to approach minimal levels necessary to unction in society, the condition of the marginally retarded is certainly less "immutable" than that of those whose retardation is more pronounced. With respect to political power, the marginally retarded are more likely to vote (*see* panel opinion, note 10).

the need for greater differences in treatment is most evident — the severely and profoundly retarded — the classification is the most suspect.

State regulations will inevitably often distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view a major and unwarranted extension of federal judicial power, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. Before we thus expand our own powers I believe the states, and those charged with the legislative and executive functions, should at least be afforded a review en banc.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom JOHN R. BROWN, Circuit Judge, joins, specially concurring in the dissent:

I join the dissent from the denial of en banc rehearing. I share the concerns so well expressed by Judge Garwood's dissent, but it is not necessary to reach a final judgment without the benefit of oral argument and collegial effort and I stop short of doing so. Only the case for en banc consideration need now be made and the dissent has done that. We have recently been willing to convene en banc solemnly to deliberate diversity cases whose vitality wholly depends on the next state court decision. *Sturgeon v. Strachan Shipping Co.*, 731 F.2d 255, 260 (5th Cir.1984) (en banc) (Rubin, J., dissenting); *Edwards Co. v. Monogram Industries, Inc.*, 730 F.2d 977, 987 (5th Cir.1984) (en banc) (Rubin, J., concurring). I am puzzled, then, that a case which implicates government's relationship with a uniquely insular minority and reexamines the relative roles of federal and state governments and their branches in their superintendence would not be deemed by a majority of this court worthy of en banc consideration.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

D. C. Docket No. CA3-80-1576 F

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs-Appellants,

versus

CITY OF CLEBURNE, TEXAS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

MARCH 5, 1984
ISSUED AS MANDATE: JULY 16, 1984

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U.S. District Court
Northern District of Texas
F I L E D
Aug. 27, 1984
Gilbert F. Ganucheau,
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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ORDER:

☐ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 27, 1984 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the

Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

☐ The motion of ..... for a further stay of the issuance of the mandate is DENIED.

CHARLES CLARK

CHIEF JUDGE

MDT-4